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No. 259.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PETITIONER,
v.
G. FALK & BROTHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The point in issue is whether upon withdrawal of imports from a bonded warehouse duties should be collected according to their weight then or on their larger weight when entered and introduced into the country, the loss having been occasioned by evaporation of moisture.

In the year 1902 respondents imported at New York, entered, and warehoused certain tobacco. They withdrew it in 1904, and the collector then demanded duty according to weight at original entry. Respondents protested, claiming that the weight at withdrawal should govern (R., 5, 6),

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the loss having been occasioned by evaporation of moisture while in the warehouse.

The Board of General Appraisers sustained the collector's action under the proviso to section 33, tariff act 1897 (30 Stat., 213) (R., 7), which reads:

> *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

The Circuit Court held the quoted proviso inapplicable because restricted to imported merchandise not entered before the tariff act of 1897 took effect, but sustained the Board's action (R., 10) because of opinion that diminution of weight by evaporation was covered by section 2983, Revised Statutes, which provides:

> In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

The Circuit Court of Appeals held section 2983, Revised Statutes, applicable only "to actual reduction in the value or quantity of the merchandise" and inapplicable to loss of weight resulting from evaporation of moisture; and that duty should have been assessed according to weight at withdrawal, under section 20, customs admin-

istrative act 1890, as amended in 1902 (32 Stat., 753), which follows:

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal. * * *

Tobacco, when imported from beyond seas, generally contains considerable moisture, which evaporates in a warehouse, causing loss in weight of from 2 to 10 per centum. Duties on leaf tobacco in 1905 amounted to nearly $20,000,000. Most of it was warehoused in this country, and if duty is assessed on weight at withdrawal hereafter all may be. Under the decision of the court below, on leaf tobacco alone Treasury officials estimate the Government revenues will lose more than $1,000,000 annually; duties on other articles, especially wool, sugar, hides, etc., containing much moisture, will materially decrease.

More than 15,000 protests are now pending before the General Appraisers.

From 1890 to 1897 frauds were practised on the customs by extracting from warehouses parts of

merchandise and then claiming allowance for loss. One purpose of Congress in 1897, when it changed the rule and required weights to be ascertained upon entry, was to prevent such frauds.

STATUTES AND REGULATIONS.

Act 1799 (1 Stat., 673) required that duties should be paid or secured before the landing of imported merchandise.

The warehouse and bonding system, as it now exists, had its origin in the act of 1846 (9 Stat., 53), which provided that thereafter all duties should be paid in cash or the goods be deposited in a warehouse.

A large proportion of imports are first entered for warehouse and their export, transportation, and withdrawal has reached to great magnitude. The delay in the payment of duties permits importers to secure a market for their goods before paying charges, and the system was inaugurated for their advantage. (Elmes Law of the Customs, 267; *Saltonstall* v. *Russell*, 152 U. S., 628, 631.)

Act March 28, 1854, section 4, (10 Stat., 271) provided that merchandise might remain in warehouse for three years without paying duties and "that there shall be no abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage, sustained by any goods, wares, or merchandise, while deposited in any public or private bonded warehouse established or

recognized by this act." The quoted provisions were carried into the Revised Statutes as section 2983 and are now in force.

Treasury Regulations for many years have required that when goods are entered for warehouse the duties shall be then ascertained and a bond given for payment. They have further permitted the owner to enter the warehouse, examine the goods, and take samples therefrom. Prior to October 1, 1890, duties were uniformly demanded and collected accord[illegible]o weights at original entry. (Customs R[illegible]ns 1884, art. 340, 458, 600, 668; 1899, art. 6[illegible]45.)

Tariff act of October 1, 1890 (26 Stat., 624):

> SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported, respectively, after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-

> one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*.

May 4, 1891, Attorney-General Miller held that the last proviso in the above-quoted section was not restricted to the preceding subject-matter—merchandise imported before the act took effect—but was of general application. He said (20 O. A. G., 81, 82):

> I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change.

This construction was followed by executive officers until the Dingley Act.

Tariff act July 24, 1897 (30 Stat., 213):

> SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been

> issued, shall be subjected to the duties imposed by this act and to no other duty upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*.

The Board of General Appraisers, July 14, 1898 (T. D., 19715), held that the proviso in section 33, act 1897, superseded the last one in section 50, act 1890, and was of general application. (R., 7.) Importers acquiesced until a recent date.

Customs administrative act June 10, 1890 (26 Stat., 140, 624), as amended by act of October 1, 1890, provides:

> SEC. 20. That any merchandise deposited *in bond* in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The act of December 15, 1902 (32 Stat., 753), amended section 20, act of 1890, to read:

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original impor-

> tation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: And provided further*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

The purpose of the act of December 15, 1902, was to give legislative interpretation to the earlier act. "The bill simply endeavors to conform the language of the section to the primary meaning and intent of the law and to accord with the custom and ruling of the Treasury Department." (Cong. Rec., Dec. 10, 1902; vol. 36, p. 200.)

In *Mosle* v. *Bidwell* (130 Fed., 334) the court declared the amendment simply exprest the real meaning of the original act.

The provisions of section 20, customs administrative act, originated in section 1, act March 14, 1866 (14 Stat., 8), carried into the Revised Statutes as follows:

Revised Statutes:

> SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal, and after

> the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges and an additional duty of ten per centum of the amount of such duties and charges.

In *Merritt* v. *Cameron* (1890; 137 U. S., 542, 550, 551) the court declared section 2970 was "intended to provide for cases in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse. * * * The two clauses of the section differ in one respect only, viz, in a ten per cent increase of duties, where the merchandise remains in the warehouse more than one year, etc." The court further said that liquidation of duties should not await withdrawal of goods for consumption, but should follow in the regular course of business as soon after entry as convenient, just as in the case of merchandise entered for immediate consumption.

Section 54, tariff act October 1, 1890 (26 Stat., 624), amended section 20, customs administrative act July 10, 1890, by inserting the words "in bond" just after the word "deposited" in the first line.

Revised Statutes:

> SEC. 2964. In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer,

or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, the merchandise shall be taken possession of by the collector and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, *to be ascertained on due entry thereof for warehousing*, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

SEC. 2983. In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse.

SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satifactory proof to him of the actual (industry) (injury) or destruction in whole or in part of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the

> custom in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon. * * *

The act of Congress March 8, 1902 (32 Stat., 54), applicable to imports from the Philippines to this country and to imports into those islands, provides:

> SEC. 5. That when duties prescribed by this act are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

Tariff act 1897, paragraph 296.

> * * * *And provided further*, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. * * *

United States v. *Alexander D. Shaw & Co.* (C. C., 141 Fed., 469); certiorari refused by Supreme Court, October 29, 1906.

ARGUMENT.

I.

The history of legislation on the subject shows the purpose of Congress to impose duties on imports according to their weight when entered for warehousing.

The act of 1854 specifically directed "that there shall be no abatement of duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any goods, wares, or merchandise whilst deposited in any public or private bonded warehouse established or recognized by this act," and so the law has remained until this day. To carry that provision into effect it was, of course, necessary to determine the weight or amount of goods at entry, and according thereto Treasury officials long collected duties.

No reason appears, e. g., why the Government should demand payment as for the full amount of liquor originally placed in a warehouse when upon withdrawal one-half had leaked and at the same time allow an importer of tobacco the benefit of the decreased weight of his goods.

The act of 1866 (sec. 2970, R. S.), in one clause, directed payment of "duties assessed on the original entry and charges," and in *Merritt* v. *Cameron* (137 U. S., 542) the court held both clauses contemplated collection according to weights at that time.

Prior to 1890 it was the uniform executive prac-

tise to collect duties upon weight at the time goods were entered for warehousing, and this was in entire harmony with the law. The customs administrative act of June 10, 1890, contained nothing inconsistent with the long-established practise. It did not, however, continue the requirement for a 10 per cent addition where goods remained in warehouse exceeding twelve months, and the second clause of section 2970, Revised Statutes, was accordingly omitted from section 20.

When the tariff act of October 1, 1890, was past, Congress, being cognizant of the established practise, for reasons deemed sufficient determined to change it, and accordingly inserted the last proviso in section 50—

> When duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*.

A few months after the act of 1890 the Attorney-General (20 O. A. G., 81) held this proviso of general application, and thereafter until 1897 executive officers followed that construction and and goods were released upon payment of duty according to weights at withdrawal. Whether abstractly right or wrong, the opinion of the Attorney-General was accepted, acted upon, and treated as law for many years.

While the Dingley bill was before Congress the Treasury advised them of the extensive frauds made possible by permitting withdrawal according to weight at that time and earnestly recommended a change in the law. (See Appendix 1.)

When the act of 1897 was past Congress knew the practise which existed prior to 1890 and the change which followed that act, and also that during preceding years extensive frauds had resulted by reason of the changed practise. With such knowledge the former provision was deliberately altered. The proviso to section 33 declares:

> That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*.

After the act of 1897 Treasury officials restored the practise existing before 1890, and on July 14, 1898, the General Appraisers held the proviso in section 33, act 1897, general in application and sustained the officers. That opinion was acquiesced in for some years.

December 2, 1902, the United States Circuit Court in New York, in *Mosle* v. *Bidwell* (119 Fed., 480, 481), decided that under section 20, administrative act June 10, 1890, warehoused goods on withdrawal for consumption should pay duties at the same rate and amount as provided by the law

when imported and entered, notwithstanding there had been a change in rate or the goods given free entry. This opinion appeared entirely out of harmony with *Merritt* v. *Cameron* and in conflict with long practise and the general understanding of the law. In order immediately to nullify the consequences of it and insure administration in harmony with the practise and general understanding the Ways and Means Committee reported and recommended passage of a bill which within a fortnight became act of December 15, 1902.

It is manifest from the statements of the chairman and the report that the purpose was simply to insure administration in harmony with the practise existing prior to *Mosle* v. *Bidwell*, and that there was no intention to interfere with the requirement of payment according to weight at entry. (See Appendix 2.)

The judgment of the Circuit Court in *Mosle* v. *Bidwell* was reversed by the Circuit Court of Appeals (130 Fed., 334), the latter holding that the act of 1902 simply declared the real meaning of the act of 1890.

II.

To require payment of duties upon warehoused imports according to their weight at entry is not inequitable.

Tariff laws must of necessity be general in terms and can not be so molded as to produce precisely the same result in every case.

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The statutes require one who enters a cargo of tobacco for consumption to pay in cash according to its weight then, notwithstanding the presence of a large percentage of absorbed sea water. If on the same date a competitor, for his convenience and profit, enters a similar cargo for warehousing and secures three years within which to pay charges no good reason appears why he should obtain the further advantage of eliminating the sea water as an element in the reckoning.

How much moisture will evaporate from a cargo of tobacco while warehoused depends, of course, upon location. If in new Mexico the desiccation might be rapid and thoro, while if in New Jersey the amount of moisture might increase. In the practical administration of the law matters of this character can not be nicely considered.

If the weight of merchandise at withdrawal determines the duty, then importers of articles which by absorption of moisture from the air become heavier after entry might complain of injustice as bitterly as do the present respondents. Wool, for example, imported by rail from the dry regions of Mexico, after lying in a warehouse in New York for several months might become appreciably heavier than when entered and weighed on the border.

To require everybody to pay according to weight when the goods come into the country probably secures equal rights to all as nearly as practicable.

III.

The proviso in section 33, act of July 24, 1897, is of general application.

The proviso is identical with the second in section 50, act of October 1, 1890, except the word "entry" is substituted for "withdrawal."

The construction by the Attorney-General giving general application to the provisions in the act of 1890, followed during the years it remained in force, was adopted by Congress when the act of 1897 was past, and has been acted on since that time by customs officers. A construction accepted and acted on for sixteen years by the Executive Departments should not be rejected except for cogent and persuasive reasons.

Robertson v. *Downing* (127 U. S., 607).

United States v. *Healy* (160 U. S., 136).

The tariff bill of 1897, as it past the House, imposed a duty of $2 per pound on unstemmed leaf tobacco; the Senate reduced this to $1.75. In conference the rate was fixt at $1.85 and the proviso to section 33 inserted (H. R. 379, 55th Cong., 1st sess.).

This proviso, altho applying to all weighable merchandise, was enacted with special reference to tobacco. The intention of Congress to make it apply to merchandise thereafter imported, and not merely to goods already imported, seems clear.

In 1900 a bill providing for duties on tobacco according to weight at withdrawal from the ware-

house was considered by the Committee on Ways and Means. The president of the Cigar Leaf Tobacco Board of Trade of the United States, urging its passage, said (Hearings before Committee on Ways and Means, Fifty-sixth Congress, first session, March 7, 1900):

> * * * The necessity for its introduction is to correct an injustice done the tobacco and cigar industry of the United States by the substitution of one word for another in the act of July 24, 1897. * * *
>
> Previous to the passage of this act duties had been levied in accordance with section 50 of the act of October 1, 1890. * * *
>
> You will note that the only difference in the wording of the two sections is in the substitution of the word "entry" in the act of 1897 for the word "withdrawn," which was in the act of 1890, and this substitution of one word for another has seriously affected the tobacco and cigar, warehouse, and insurance interests of the country. * * *

The chairman (Mr. Payne) replied:

> I remember very distinctly when this change was made in the conference committee it was represented by the United States officials that the duty had been provocative of very great frauds on the revenue; that tobacco not only shrank in weighing in drying out, but it shrank from some other reasons, and it was charged that tobacco, sugar, and some other commodities disappeared from the bonded warehouse, and when they came to weigh out there was a great shrinkage.

> That was the charge made by the United States officials and the reason the change was made back to the old law prior to 1890. (See Appendixes 1 and 2.)

To give this proviso general application conforms to the principles of statutory construction. In *United States* v. *Whitridge* (197 U. S., 135, 143), this court said:

> While, no doubt, the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.

In *United States* v. *Downing* (146 Fed., 56, 59) the Circuit Court of Appeals, Second Circuit, January 10, 1906, held a proviso to paragraph 626, tariff act 1897, providing for countervailing duty upon crude petroleum and its products, general in application and included products of crude petroleum not mentioned in the preceding part of the paragraph, and said:

> It is, no doubt, the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is

attached. But such a rule is not controlling, especially in such composite structures as tariff and appropriation acts.

Section 5, act of Congress, March 8, 1902 (32 Stat., 54), to provide revenue for the Philippines, directs as to articles going into the islands or imported from them into this country, that when duties "are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry." This in effect was a legislative construction of section 33, act of 1897. Congress certainly did not intend to establish a rule as to imports from the Philippines less favorable than the one applicable to those from foreign countries.

The construction asked by the Government harmonizes with other requirements of the tariff law. (R. S., 2964.) One who finds his merchandise decreased by half at the end of the warehouse period by "injury, damage, loss, or leakage" (sec. 2983, R. S.) must nevertheless pay according to original weight. If a different rule applies where there is decrease in weight by evaporation of moisture a very clear declaration to that effect should exist. The act of 1897, par. 296, in terms provides that *no* allowance shall be made for leakage, etc., of spirits, altho it may occur before they are entered.

United States v. *Alexander D. Shaw & Co.* (141 Fed., 469); certiorari refused by Supreme Court October 29, 1906.

IV.

Section 20, act June 10, 1890, as amended in 1902, relates to rate of duty and not time when weight shall be ascertained.

The purpose of this section was to prescribe a rule applicable to warehoused goods in case of change in tariff rates, as, for example, if the President should suspend the ordinary rate under section 3, or a reciprocity treaty should be negotiated under section 4, act 1897, or a special act should be past.

Construing section 2970, Revised Statutes, from which section 20 was taken, Mr. Justice Lamar for the court said in *Merritt* v. *Cameron* (137 U. S., 542, 550, 551):

> *In our opinion that section was intended to provide for a case in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse.* (*Fabbri* v. *Murphy*, 95 U. S., 191; act of March 14, 1866, 14 Stat., 8, c. 17.) The first clause of the section means simply that if there has been a *change in the rate of duty* after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards and within one year from the date of the importation, the duties to be paid are such as are fixed by

> the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry and 10 per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated within the meaning of those terms, as used in section 2931. In either case, if the statute *changing* the rate of duties goes into effect after the liquidation of the original entry, a reliquidation must necessarily take place. *The two clauses of the section differ in one respect only, viz, in a 10 per cent increase of duties*, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the statute harmonious.

Merritt v. *Cameron* was followed in *Saltonstall* v. *Russell* (152 U. S., 628, 633).

In the present case (R., 18) the Circuit Court of Appeals took a different view of these two clauses, saying that "in section 2970 the distinction is sharply drawn between duties * * * to which it may be subject by law at the time of withdrawal and duties assessed on the original entries."

Referring to *Mosle* v. *Bidwell* (130 Fed., 334), it said:

> We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were withdrawn, duty would have been assessed thereon according to its weight at that time.

In that case the Circuit Court of Appeals held that under section 20 of the act of December 15, 1902, cigars imported from Porto Rico and warehoused prior to the ratification of the treaty of peace with Spain and withdrawn after the ratification but before the passage of the Foraker Act were entitled, like other goods imported at the time of withdrawal, to be free from duty. Clearly an entirely different question was involved, wholly inapplicable here. The *amount* of duty is one thing—the *rate* another. Like tobacco imported at the time the imposts in question were withdrawn paid the same rate.

In *Hartranft* v. *Oliver* (125 U. S., 525), and other cases relied upon by respondent, there had been a change in the rate of duty before the goods past out of Government control.

V.

If the proviso to section 33, act 1897, is inapplicable, nevertheless the tobacco was dutiable according to its weight at entry.

Duties accrue when imports arrive at port of entry. The debt is then due, altho a statute

may make it payable afterwards. (*Saltonstall* v. *Russell*, *supra*.)

> Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for the ordinary leakage and deterioration. (*Belcher* v. *Linn*, 24 How., 508, 525; *American Sugar Refining Co.* v. *United States*, 181 U. S., 610.)

In *Merritt* v. *Cameron* (137 U. S., 542, 549, 550), Mr. Justice Lamar, for the court, said:

> We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascertainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of the duties are the same in the one instance as in the other. The measurement, weighing, or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value are required to be proceeded with exactly the same in each instance. After the ascer-

> tainment of those facts in relation to the entry the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

Section 2890, Revised Statutes, provides that where duties are based upon weight or measure the weighers shall within three days after discharge of a vessel make return upon the articles weighed or measured by them.

Section 2882, Revised Statutes, prohibits removal of merchandise without permission before it has been weighed or measured.

Section 2964, Revised Statutes, expressly directs that duties on warehoused merchandise shall "be ascertained on due entry thereof for warehousing."

These decisions and statutes show that Congress intended to require merchandise to be weighed and measured immediately upon arrival and duties assessed according to condition at that time. There is no provision of law for reweighing or remeasuring.

Sections 2983 and 2984, Revised Statutes, show that no allowance or abatement of duty can be made in any case where goods are warehoused, except for accidental fire or other casualty.

It is said the word "loss" in section 2983 does not include the evaporation of moisture from tobacco. But construing sections 2983 and 2984 together it is plain that 2983 refers to every loss except that occasioned by accidental fire or other casualty.

Loss of liquor by evaporation is within section 2983. (Treas. Dec., 15400.)

Change of condition from that of uncleaned rice to a by-product is a deterioration within the meaning of section 2983. (21 Op. A. G., 474.)

In the case under discussion a certain lot of tobacco went into warehouse and lost weight while there. What became of the difference? It was lost, or it leaked, or it was damaged, injured, or deteriorated. It certainly disappeared. And if it disappeared, no matter by what means, it must be lost. No explanation as to how or why it disappeared could take the disappearance out of the meaning of one of the five words embraced in section 2983.

In *Seeberger* v. *Wright & Lawther Co.* (157 U. S., 183), it was held that an allowance should be made at the time of entry for impurities which are no part of the merchandise and the amount of which can be readily ascertained. The merchandise referred to in that case was uncleaned flaxseed, containing clay, sand, and gravel.

On the other hand, it was held in *Earnshaw* v. *Cadwalader* (145 U. S., 247), that iron ore, contain-

ing in its commercial state a certain amount of moisture, was taxable upon its weight with the moisture included.

The present case is more analogous to *Earnshaw* v. *Cavendaler* than to the *Seeberger* case. Leaf tobacco when imported contains moisture. That must be regarded as its commercial state, and it is upon such tobacco, moisture included, that duty must be paid when entered for consumption.

Here no allowance was claimed at entry. If the tobacco contained an unusual amount of moisture, claim should have been made then. Article 1276 of the Customs Regulations of 1899 provides for an allowance "whenever the weight of imported merchandise has apparently increased by the unusual absorption of sea water, or of moisture, while on the voyage of importation," if application is made within ten working days after landing the goods.

No allowance is made for ordinary moisture, nor for evaporation or shrinkage upon the voyage of importation (see *Robertson* v. *Bradbury*, 132 U. S., 500), except by express provision of law. Paragraph 393 of the tariff of 1897 provides that the duty upon wood pulp shall be upon its *dry* weight.

When Congress fixt the rate of duty it necessarily took into consideration that imported tobacco contains a certain amount of moisture and adjusted the duty with that fact in view.

Whether the proviso to section 33, act of 1897,

is applicable or not, it is clear that the tobacco in question was dutiable upon its weight at entry, there being no statute authorizing reliquidation because of change in weight while goods are warehoused.

I respectfully ask that the judgment of the court below be reversed.

J. C. McReynolds,
Assistant Attorney-General.

November, 1906.

Appendix 1.

Fifty-fifth Congress, first session—H. R. 379.—The Dingley Bill.

Mar. 18, 1897.—Reported to the House from the Committee on Ways and Means.
Mar. 31, 1897.—Passed the House.
Apr. 1, 1897.—Referred to Senate Committee on Finance.
May 4, 1897.—Reported to the Senate with amendments.
July 7, 1897.—Passed the Senate with amendments.

Office of the Collector of Customs,
Port of New York, May 4th, 1897.

Dear Mr. Howell: On April 19th I sent you a memorandum suggesting amendments to the pending revenue bill, in which I called particular attention to the proviso in the section proposed to be inserted, which proviso was intended to reverse the second proviso of section 50 of the act of October 1, 1890. I then called attention to the fact that the differences in weight between the importation and the withdrawal of merchandise indicated that the Government had suffered material loss of revenue through illicit abstractions of portions of the contents. I now send you a further memorandum that will illustrate my meaning. Six bonds covering Havana tobacco (filler) and also six bonds covering Sumatra tobacco (wrapper) imported in the year 1895 were selected at random and a full statement given as per memorandum. It is believed that these several bonds present a

fair sample of the conditions of other importations of tobacco during that year.

To this specific information I have added a memorandum showing the number of bales of Havana tobacco and also of Sumatra tobacco imported during the year 1895, together with the loss in duty based upon the average found from the bonds fully reported upon as above. You will note that on 3,020 bales of filler tobacco there was an actual loss to the Government of $6,998.11 in duties; while on 657 bales of wrapper tobacco there was an actual loss of $6,793.39. Carrying this ratio of loss to the importations of the year gives us a loss upon filler tobacco of $273,382.79, and on wrapper tobacco of $197,121.95, or a total of $470,504.74—this upon the item of tobacco alone.

You will readily see how important it is that this matter should be remedied, in view of the fact that the proposed act greatly increases the volume of merchandise that will be subject to specific duties, and hence, unless the law is changed, subject to reweighing on withdrawal from warehouse.

Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.

Hon. W. B. HOWELL,
Assistant Secretary of the Treasury,
Washington, D. C.

[Enclosed in letter of May 4, 1897.]

Memorandum showing loss in revenue on tobacco reweighed in bonded warehouse at port of New York.

HAVANA TOBACCO (FILLER).

Bond No.	Date of arrival.	No. of bales.	Landed weight.	Weight when withdrawn.	Loss in weight.	Loss in duty.
59880	Oct. 28, 95	537	67, 987	64, 443. 57	3, 543. 43	$1, 240. 20
50256	May 27, 95	386	49, 633	46, 228. 30	3, 404. 70	1, 191. 65
59005	Oct. 14, 95	434	62, 381	58, 987. 316	3, 393. 684	1, 187. 79
56793	Sept. 9, 95	530	65, 803	62, 210	3, 593	1, 257. 55
56981	Sept. 12, 95	559	70, 982	67, 806. 4286	3, 135. 5714	1, 097. 45
55569	Aug. 17, 95	574	72, 190	69, 265. 8	2, 924. 2	1, 023. 47
		3, 020				6, 998. 11

SUMATRA TOBACCO (WRAPPER).

50329	May 27, 1895	18	3, 048	2, 931. 06	116. 94	$175. 41
49371	May 13, 1895	46	8, 119. 25	7, 845. 53	273. 72	410. 58
49759	May 20, 1895	306	53, 167. 75	51, 230. 897	1, 936. 853	2, 905. 28
49325	May 13, 1895	122	21, 740. 25	20, 942. 27	797. 98	1, 196. 97
49374	May 13, 1895	49	8, 504. 25	8, 215. 97	288. 28	432. 42
49370	May 13, 1895	116	19, 349. 75	18, 234. 5967	1, 115. 1533	1, 672. 73
		657				6, 793. 39

IMPORTED DURING YEAR 1895.

	Bales.	
Havana.....	117, 977—Loss in duty on above percentage.	$273, 382. 79
Sumatra.....	19, 064—Loss in duty on above percentage.	197, 121. 95
	137, 041	470, 504. 74

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, May 26, 1897.

SIR: I had the honor on the 8th instant to send with my approval a copy of a letter received from J. J. Couch, esq., special deputy collector of customs at New York, in regard to the propriety of

amending the pending tariff bill so as to dispense with the weighing of imported merchandise when withdrawn from bond, as now required under the proviso to section 50 of the tariff act of October 1, 1890.

As this question is of great importance, not only to the revenue but to the convenience in the administration of customs law, I take the liberty of recalling the matter to your attention, and inclose for your information another copy of Mr. Couch's letter, the terms of which I cordially approve.

It is found that a serious diminution in the revenue results from the practice above referred to. In one case which recently occurred on the withdrawal of certain tobacco the difference between the weight on importation and that on withdrawal amounted to a diminution of about $500 in duties.

As all merchandise, except weighable merchandise, is assessed with duty on importation, there does not seem to be any valid reason why an exception should be made in regard to weighable goods. It is essential to the accuracy of customs accounts that weighing shall be done on the landing of goods, even in cases where the goods are warehoused, and weighing is again required on their withdrawal for consumption, and the weighing of successive portions of one invoice entails labor and loss of time, as well as probable loss of duty from the wastage or drying out of the goods in warehouse.

Respectfully, yours,

W. B. HOWELL,
Assistant Secretary.

To the CHAIRMAN COMMITTEE ON FINANCE,
U. S. Senate.

Appendix 2.

From Congressional Record, December 10, 1902, volume 36, Fifty-seventh Congress, second session.

(P. 197) Mr. Payne. Mr. Chairman, this bill is brought here to give a legislative interpretation to what is known as section 20 of the customs administrative act. Section 20 of that act, as it now stands in the law, is as follows:

"Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Under that section of the statute it has been the invariable custom and ruling of the Treasury Department that when goods were imported from a foreign country and placed in a bonded warehouse for a period of time that at the time of their withdrawal the duty upon them should be the rate of duty then existing; that is, the rate of the duty existing at the time of the withdrawal from the bonded warehouse and not at the time of their importation, when they were placed in the bonded warehouse; and nobody had ever discovered but what this section of the statute meant just that and no more. But last week a case was decided in the District Court of the Southern District of New York, Judge Wallace rendering the opinion, in which the contrary was held. That case arose in regard to the importation of a cargo of sugar from

Porto Rico into the United States prior to the 11th of April. The date of the ratification of the Paris treaty was on the 11th, I think, and the importation was on the 4th of April prior to the ratification of the treaty with Spain.

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(P. 199) MR. PAYNE. Mr. Chairman, I ask unanimous consent to extend my remarks on this bill by adding the report of the committee and having it printed in the Record.

* * * * *

[House Report 2802, Fifty-seventh Congress, second session.]

The Committee on Ways and Means, to whom was referred the bill (H. R. 15794) to amend section 20 of an act entitled "An act to simplify the laws in relation to the collection of the revenues," report the same back without amendment, recommending its passage.

This bill proposes to amend section 20 of said act, which reads as follows:

"SEC. 20. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Under this section the Secretary of the Treasury has invariably held that on a withdrawal of bonded

merchandise from the warehouse the duties to be collected are at the same rate as those existing at the time of the withdrawal and not at the time of the importation. Last week a case was decided in the Circuit Court of New York, which has been called to the attention of the committee by the following letter of the Secretary of the Treasury, viz:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*Washington, December 8, 1902.*

"MY DEAR SIR: Section 20 of the customs administrative act is in the following language:

"'Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.'

"Relying upon this section, it has been the practice of the Department to collect duty at the rate imposed by law at the time the goods are withdrawn from warehouse.

"I inclose herewith a copy of the decision rendered by the District Court of the United States for the Southern District of New York, where it is held that warehoused goods on withdrawal for consumption are dutiable at the same rate as when warehoused.

"By the recent act of Congress tea is admitted free after December 31, 1902. There is now in the several warehouses of the United States a very large amount of tea imported under the impression that it could be warehoused and withdrawn free after the 31st of December, 1902. It

does not lie with this Department to question the correctness of the decision quoted, and it must therefore collect duty according to the terms of the statute now in force.

"The question is of so great importance and so many merchants, both wholesale and retail, are interested therein that the Department deems it important to call special attention of Congress thereto, and it recommends a modification of the law, either by amending section 20, above quoted, or by special act allowing the free withdrawal of tea now in warehouse. Unless this is done it probably will be exported and much delay and litigation will ensue, for much of it has been sold to be delivered January 1, 1903, at a price ruinous to wholesale merchants.

"Very respectfully, L. M. SHAW.

"HON. SERENO E. PAYNE,
"*Chairman Ways and Means Committee,*
House of Representatives."

The case was argued on November 5, 1902, and the decision therein was handed down on December 2, instant.

The importation in this case consisted of sugar, by the steamship *Caracas*, on April 4, 1899, entered on that day for warehouse under the usual bond, duties unpaid. The goods remained in bonded warehouse until May 6, 1899, when they were withdrawn for consumption and duties then paid by the plaintiffs under protest. The protest claimed that the goods were not dutiable, because the treaty of cession with Spain had been ratified before the date of such withdrawal, and that at the time of such withdrawal Porto Rico

was not a foreign country, and that goods in warehouse were only liable to duty under laws existing at the time of their withdrawal. The amount of duties paid by the plaintiffs and sought to be recovered in this action of the defendant, as collector of the port of New York, was $1,442.24, with interest.

To the complaint of the plaintiffs in this action I interposed a demurrer on behalf of the defendant, that the said complaint did not state facts sufficient to constitute a cause of action.

The question of law in the case was whether the goods that were dutiable at the time of their original entry under the laws then existing were made nondutiable by being warehoused under bond and not withdrawn for consumption until after Porto Rico had been ceded to the United States by treaty with Spain.

After hearing argument, Judge Wallace reserved his decision until December 2 instant, when he handed down the following opinion:

"WALLACE, circuit judge.

"The demurrer to the complaint presents the question whether, under section 20 of the customs administrative act (act of June 10, 1890, as amended October 1, 1890), the collector of the port of New York was justified in requiring payment of duties upon imported merchandise at the rate and amount to which the goods were subject at the time of their importation and deposit in the bonded warehouse, or whether he was justified only in requiring payment of such duties as they would have been subject to if imported at the date of their withdrawal for consumption. The goods

consisted of sugars imported from Porto Rico. They were imported and entered for warehouse, and bonded April 4, 1899. The collector liquidated the duties thereon at $1,442.24, and it is to be assumed, in the absence of averments to the contrary, that at the time the goods were subject to duty in that amount.

"Subsequently, and on May 6, 1899, they were withdrawn for consumption, and the collector required payment for the duties as liquidated. The complaint avers that they were not subject or liable to any duty at that date because they were not imported from a foreign country into the United States within the meaning of any valid statute or Executive order of the United States. It is conceded by counsel that this averment means that before the sugars were withdrawn for consumption, the treaty of peace between the United States and Spain having been ratified, the sugars, being importations of Porto Rico, were not dutiable because Porto Rico was no longer a foreign country within the meaning of the tariff acts, according to the decisions of the Supreme Court of the United States.

"Section 20 of the customs administrative act provides as follows: 'That any merchandise deposited in bond in any public or private warehouse may be withdrawn for consumption within three years from the date on which they were originally imported on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.'

"It is not disputed that the goods were subject to duty in the amount exacted of the plaintiffs when they were deposited in bond. Being then

subject to these duties, they remained so in the absence of any treaty or statute of Congress relieving them from duty. No such treaty or statute is invoked, but the argument is that the section means to allow the withdrawal of dutiable goods upon the payment of such duties as they would have been subject to if they had been imported at the time of the withdrawal. The language of the section does not require such a construction. It requires payment of the duties to which the goods are lawfully subject at the time of the withdrawal. This means the duties which have become an accrued liability. Duties accrue at the date of the importation and entry of merchandise, and on that date a lien attaches to the goods and a debt for the amount accrues from the importer to the Government. Warehousing is a privilege given by statute to which the section relates by which, in lieu of compelling the importer to make immediate payment of his debt, he is permitted to postpone payment until he withdraws the merchandise from the warehouse for consumption. The privilege is not conferred in order that he may thereby escape, by some contingency, the payment of his debt. It does not contemplate giving him an advantage in that regard over other importers who pay their duties upon the entry of their goods.

"Warehoused goods on withdrawal for consumption pay duties at the same rate and amount as provided by law when imported and entered, unless there is some provision of the existing tariff laws or in subsequent legislation by Congress providing for the payment of a different rate or amount, and applicable to the goods in warehouse. The United States have never been divested of their right to

the duties which accrued when the goods were imported and warehoused, because neither the treaty of peace by any of its provisions nor any statute passed subsequently to the one imposing the duty has impaired or affected that right.

"None of the decisions of the Supreme Court cited for the plaintiffs conflict with the conclusions thus reached. The observations in the opinions are to be read as addressed to the facts of the particular case under consideration by the court, and so read contain nothing to sanction the argument for the plaintiffs.

"Judgment is ordered for the defendant."

In repealing the war tax at the last session there was included in that repeal a duty of 10 cents a pound upon tea, which is to take effect by the terms of said repealing act on the 1st day of January, 1903. Under the practice of the Treasury Department this would have relieved entirely from duty all teas imported and remaining in bonded warehouses and withdrawn after the 1st of January. But under the decision of the court, and the change in the policy of the Treasury Department on account of said decision, such teas would now have to pay the duty of 10 cents a pound, unless such legislation as is proposed in the pending bill shall be enacted by Congress before the 1st of January.

Large quantities, and the committee is informed whole cargoes, of teas have been put in bonded warehouses since the passage of the repealing act, ready to be shipped after the 1st of January to supply the trade of the country. Wholesale and retail dealers, relying upon the construction here-

tofore placed upon section 20 by the Department, have run their stocks down to a very low point and must replenish them. It would seem that quantities of these teas have been sold in bond, so that the loss would affect not so much the importers as the wholesale and retail dealers in teas, as is evidenced by the following telegram received by the chairman of the committee, viz:

"NEW YORK, *December 9, 1902.*

"SERENO E. PAYNE,

"*House of Representatives, Washington, D. C.*

"Secretary of Treasury Shaw's late decision regarding duty to be collected upon teas in bond most serious matter, and would be disastrous to the tea and grocery trade in this country, who have purchased teas at five and seven cents per pound advance over previous year, and would now be compelled to pay 10 cents additional. Importers have largely protected themselves by selling in bond, but merchants through the country have agreed to deliver teas free after January 1.

"CARTER, MACY & Co."

New teas will be coming in early in the year, and without change in the existing law unequal burdens would be thrown upon the trade.

The bill simply endeavors to conform the language of the section to the primary meaning and intent of the law, and to accord with the custom and ruling of the Treasury Department. There is no reason why any merchandise imported and placed in bonded warehouses should pay a higher or different rate of duty than that imposed upon like merchandise imported at the time of the with-

drawal of the former, as both enter the market under the same circumstances and conditions of trade. The contrary rule would be liable at any time, in case of a change in tariff rates, to be a disturbing factor, and result in great loss.

The bill should be put upon its passage at the earliest opportunity, in order that the intention of Congress, both in the repeal of this war duty and in originally enacting what is known as the customs administrative act, may have their intended effect.

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